

1                               BEFORE THE LAND USE BOARD OF APPEALS  
2                               OF THE STATE OF OREGON  
3

4 WALTER O. WARD and CATHERINE C.                               )  
5 WARD,                                                                        )  
6                                                                                )  
7                               Petitioners,                                )  
8                                                                                )  
9                               vs.                                                )  
10                                                                                )  
11 CITY OF LAKE OSWEGO,                                                )  
12                                                                                )  
13                               Respondent,                                )  
14                                                                                )  
15                               and                                                )  
16                                                                                )  
17 LARRY GARSIDE and JOLINE GARSIDE,                                )  
18                                                                                )  
19                               Intervenors-Respondent.                        )  
20  
21

LUBA No. 91-053  
FINAL OPINION  
AND ORDER

22                               Appeal from City of Lake Oswego.

23  
24                               Daniel H. Kearns, Portland, filed the petition for  
25 review. With him on the brief was Preston, Thorgrimson,  
26 Shidler, Gates & Ellis. Daniel H. Kearns and Timothy J.  
27 Sercombe argued on behalf of petitioners.  
28

29                               Jeffrey Condit, Lake Oswego, filed a response brief and  
30 argued on behalf of respondent.  
31

32                               Paul Norr, Portland, filed a response brief and argued  
33 on behalf of intervenors-respondent.  
34

35                               SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,  
36 Referee, participated in the decision.  
37

38                               AFFIRMED                                               08/14/91  
39

40                               You are entitled to judicial review of this Order.  
41 Judicial review is governed by the provisions of ORS  
42 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council order determining  
4 that petitioners' lakeside property is not a buildable lot.

5 **MOTION TO INTERVENE**

6 Larry Garside and Joline Garside move to intervene in  
7 this proceeding on the side of respondent. There is no  
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject property (Tax Lot 10800) is an undeveloped  
11 strip of land approximately 200 feet in length and 8,600  
12 square feet in area. Record 119, 123. The narrower end of  
13 the property (approximately 25 feet in width) fronts on  
14 Greenbriar Road. Record 139. The opposite end of the  
15 property (approximately 64 feet in width) abuts the lake.  
16 Record 137.

17 The parent parcel (Lot 538) of the subject property was  
18 platted sometime prior to 1946, when the area in question  
19 was an unincorporated part of Clackamas County. In 1946,  
20 Lot 538 came under common ownership with the adjacent Lot  
21 537. At that time, the owner of Lots 537 and 538 conveyed a  
22 ten foot strip of Lot 538 to the owner of the adjoining Lot  
23 539. The remainder of Lot 538 is now identified as Tax Lot  
24 10800, the subject of this appeal.

25 In 1959, the subject area was annexed to the City of  
26 Lake Oswego. In 1961, the city adopted a new zoning

1 ordinance and zoned the subject area Residential R-7.5. At  
2 that time, the R-7.5 zone required a 7,500 square foot  
3 minimum lot size and a "minimum lot width at the front  
4 building line" of 60 feet. Lake Oswego Code (LOC) (1961)  
5 51.440. There is no dispute that the single ownership  
6 comprised of Lot 537 and the remainder of Lot 538 complied  
7 with these area and dimensional requirements at the time  
8 R-7.5 zoning was applied.

9 In 1963, the owner of Lots 537 and the remainder of Lot  
10 538 split the property by transferring Lot 537 to a Mr. Berg  
11 and the remainder of Lot 538 (now Tax Lot 10800) to  
12 petitioners. The 1958 Subdivision Ordinance in effect at  
13 the time did not regulate partitions creating fewer than  
14 four parcels, and no city permit, variance or other land use  
15 approval was obtained at the time of these transfers.

16 In 1982, the city adopted a new Zoning Ordinance,<sup>1</sup> and  
17 rezoned the subject property Residential Medium and Low  
18 Density (R-10). The R-10 zone has a 10,000 square foot  
19 minimum "lot area per unit" and a minimum "lot width at  
20 building line" of 65 feet.<sup>2</sup> LOC 48.210.1. The 1982 Zoning  
21 Ordinance also includes the following provision:

22 "General exception to lot size requirements.

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<sup>1</sup>The 1982 Zoning Ordinance is codified as Title 48 of the current LOC.

<sup>2</sup>The parties agree that Tax Lot 10800 does not satisfy these requirements of the current R-10 zoning.

1 "If, on December 16, 1982, a lot, or the aggregate  
2 of contiguous lots held in a single ownership, has  
3 an area or dimension which does not meet the  
4 minimum lot area per unit or lot size requirements  
5 of the zone in which the property is located, the  
6 lot or aggregate holdings may be occupied by a use  
7 permitted outright in the zone subject to the  
8 other requirements of the zone and this Code  
9 \* \* \*."<sup>3</sup> LOC 48.515(1).

10 During 1989, several letters were exchanged between  
11 petitioners and the city planning department, and  
12 intervenors and the planning department, with regard to  
13 whether petitioners' property qualifies for an exception  
14 from the R-10 lot standards pursuant to LOC 48.515(1). In  
15 three informal opinion letters, city planning staff  
16 expressed successive positions that the subject property is,  
17 might be and is not entitled to an exception under LOC  
18 48.515(1).

19 Petitioners finally requested a formal determination  
20 from the city on whether the subject property is a buildable  
21 lot under the LOC. Record 141-43. On June 11, 1990,  
22 pursuant to LOC 48.025,<sup>4</sup> the planning director issued a

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<sup>3</sup>The 1961 Zoning Ordinance contained a provision virtually identical to that quoted in the text, save that the effective date for purposes of the 1961 general exception provision was "the time of passage of this ordinance," i.e. November 21, 1961. LOC (1961) 50.310. However, the 1961 provision is not at issue in this case, because on the critical date Lot 537 and the remainder of Lot 538 were an "aggregate of contiguous lots held in a single ownership," and that ownership complied with the lot area and dimension requirements of the then applicable R-7.5 zone.

<sup>4</sup>LOC 48.025 provides in relevant part:

"Interpretation, Regulations and Procedures, Delegation.

1 letter determining that petitioners' property is a buildable  
2 lot. Record 125. Intervenors-respondent (intervenors)  
3 appealed that decision to the planning commission. On  
4 October 8, 1990, after a public hearing, the planning  
5 commission issued an order reversing the planning director's  
6 interpretation and concluding that the subject property is  
7 not a buildable lot. Petitioners appealed that decision to  
8 the city council. On April 16, 1991, after an additional  
9 public hearing, the city council issued an order affirming  
10 the planning commission's decision that the subject property  
11 is not a buildable lot. This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13       "\* \* \* Since [Tax Lot 10800] was legally created  
14       and is dimensionally deficient, it is eligible for  
15       a building permit for a single-family dwelling.  
16       The City's decision to the contrary misconstrues  
17       the applicable law and prejudices petitioners'  
18       substantial rights."

19       Petitioners argue:

20       "This case may be distilled down to two issues:  
21       (1) was [Tax Lot 10800] lawfully created and  
22       (2) if so, what uses may lawfully be made of the

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"1. The City Manager has the initial authority and responsibility to interpret all terms, provisions and requirements of this chapter. A request for an interpretation shall be made in writing and the interpretation given may be appealed to the Planning Commission pursuant to the provisions of LOC 48.830.

"\* \* \* \* \*

"3. The City Manager may delegate any authority or responsibility identified in this chapter to any suitable person."

1 lot under the present version of the LOC?<sup>[5]</sup> \* \* \*  
2 All parties agree that, if [Tax Lot 10800] was  
3 'legally created' and otherwise meets the  
4 requirements of the 'grandfather clause' exemption  
5 of 1982 LOC § 48.515(1) then [Tax Lot 10800] is  
6 eligible for a building permit to construct a  
7 single-family dwelling, despite its dimensional or  
8 area deficiencies. \* \* \* " Petition for Review  
9 12-13.

10 Petitioners maintain the city council erroneously  
11 concluded Tax Lot 10800 was illegally created because it was  
12 not at least 60 feet wide "at the front building line" when  
13 it was created in 1963, as then required by LOC (1961)  
14 51.440(2).<sup>6</sup> Record 13. The LOC (1961) did not contain a  
15 definition of "front building line." However, there is no  
16 disagreement between the parties that the term means a line  
17 parallel to the front lot line, located at a distance from  
18 the front lot line equal to the required front yard setback.  
19 Record 31. LOC (1961) 51.450 and 51.050 imposed a front  
20 yard setback requirement of 20 feet in the R-7.5 zone.  
21 There is also no disagreement that Tax Lot 10800 is less

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<sup>5</sup>We note that in its response brief, respondent states only the first of these issues is contested. Respondent concedes that if Tax Lot 10800 was legally created in 1963, it would qualify under LOC 48.515(1) for relief from current R-10 lot size requirements.

<sup>6</sup>LOC (1961) 51.440(2) provided:

"In an R-7.5 zone the lot size shall be as follows:

\* \* \* \* \*

"(2) The minimum lot width at the front building line shall be sixty feet."

1 than 60 feet in width at such a line.

2 According to petitioners, Tax Lot 10800 was not in  
3 violation of LOC (1961) 51.440(2) when it was created.  
4 Petitioners contend the minimum lot width requirement of LOC  
5 (1961) 51.440(2) applied only to lots containing structures,  
6 not to the creation of an undeveloped lot which could be  
7 used for nonstructural purposes then allowable in the R-7.5  
8 zone, such as a vegetable garden.<sup>7</sup> Thus, petitioners  
9 contend the minimum lot width requirement of LOC (1961)  
10 51.440(2) was not applicable to Tax Lot 10800 at the time  
11 this lot was created, and the city therefore may not rely on  
12 that LOC provision in concluding that Tax Lot 10800 was not  
13 legally created.

14 Petitioners further argue that if Tax Lot 10800 was  
15 legally created under the standards existing in 1963, then  
16 it may be developed. Petitioners contend LOC 48.515(1),  
17 which they refer to as a "grandfather clause," allows a  
18 single family dwelling to be built on a legally created lot  
19 which existed when the 1982 Zoning Ordinance was adopted,  
20 but is dimensionally deficient. According to petitioners,  
21 Tax Lot 10800 qualifies for this exemption "because it was  
22 legally created and legally existed as a separate lot on  
23 December 16, 1982, and it is dimensionally deficient in

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<sup>7</sup>Petitioners argue that if there are no structures on a lot, no setback requirements can possibly apply. Consequently, according to petitioners, if there is no setback requirement, there can be no "front building line."

1 terms of lot area and lot width." Petition for Review 17.

2 **A. Waiver**

3 Respondent and intervenors-respondent (respondents)  
4 contend the issue of whether the LOC (1961) 51.440(2) lot  
5 width requirement applied to the creation of undeveloped  
6 lots was not raised before either the planning commission or  
7 city council below. Therefore, respondents contend,  
8 petitioners may not argue for the first time before this  
9 Board that the LOC (1961) 51.440(2) lot width requirement  
10 did not apply to creation of undeveloped lots or argue,  
11 based on that interpretation, that Tax Lot 10800 was legally  
12 created in 1963. ORS 197.763(1); 197.830(10). Respondents  
13 state petitioners argued below that Tax Lot 10800 was  
14 legally created in 1963 only on the the ground that the LOC  
15 (1961) 51.440(2) lot width requirement did not apply because  
16 the subject property was not regulated by the city's 1958  
17 Subdivision Ordinance.

18 In Brown & Cole, Inc. v. City of Estacada, \_\_\_ Or LUBA  
19 \_\_\_ (LUBA No. 91-038, July 26, 1991), slip op 14, we  
20 recently stated:

21 ORS 197.763(1) requires that issues raised before  
22 this Board be raised in the local proceedings  
23 'with sufficient specificity so as to afford the  
24 governing body \* \* \* and the parties an adequate  
25 opportunity to respond to each issue.' We have  
26 stated ORS 197.763(1) does not require that  
27 arguments identical to those in the petition for  
28 review have been presented during local  
29 proceedings, but rather that 'argument presented  
30 in the local proceedings sufficiently raise the

1 issue sought to be raised in the petition for  
2 review, so that the local government and other  
3 parties had a chance to respond to that issue.'  
4 Hale v. City of Beaverton, \_\_\_ Or LUBA \_\_\_ (LUBA  
5 No. 90-159, June 5, 1991), slip op 8; Boldt v.  
6 Clackamas County, [\_\_\_ Or LUBA \_\_\_ (LUBA No.  
7 90-147, March 12, 1991), slip op 8, aff'd 107  
8 Or App 619 (1991)]. The Court of Appeals has  
9 affirmed this interpretation of the ORS 197.763(1)  
10 'sufficient specificity' requirement, stating  
11 '\* \* \* the statute requires no more than fair  
12 notice to adjudicators and opponents, rather than  
13 the particularity that inheres in judicial  
14 preservation concepts.' Boldt v. Clackamas  
15 County, 107 Or App 619, 623 \_\_\_ P2d \_\_\_ (1991)."

16 In this case, respondents concede petitioners contended  
17 below that Tax Lot 10800 was legally created in 1963 because  
18 the lot width requirement of LOC (1961) 51.440(2) was not  
19 applicable to its creation. While petitioners did not  
20 advance below a legal argument identical to that found in  
21 the petition for review in support of their contention that  
22 LOC (1961) 51.440(2) was inapplicable, petitioners did raise  
23 the issue sufficiently to provide respondents an opportunity  
24 to respond to the issue of the applicability of LOC (1961)  
25 51.440(2) to the 1963 creation of Tax Lot 10800.

26 **B. Merits**

27 Respondents point out that LOC (1961) 51.440(2) states  
28 that "[i]n an R-7.5 zone, the lot size shall be as follows  
29 \* \* \*." (Emphasis added.) Respondents argue that the three  
30 requirements which follow (lot area, width and depth) are  
31 all phrased in mandatory terms and make no distinction  
32 between developed and undeveloped lots. Respondents concede

1 there is no definition of "front building line" in the 1961  
2 Zoning Ordinance. However, respondents assert the 1958  
3 Subdivision Ordinance, of which this Board may take official  
4 notice, defines "building line" as "a line on a plat  
5 indicating the limit beyond which buildings or structures  
6 may not be erected." Ord. No. 565, Sec. 1.1. According to  
7 respondents, "front building line" is therefore a line  
8 established pursuant to required setbacks which determines  
9 where structures may be located on a parcel. Respondents  
10 further argue that because the purpose of setback  
11 requirements is to determine where a building can be located  
12 on a site, they necessarily apply to vacant parcels.

13 Respondents also contend the purpose of lot dimension  
14 requirements such as those imposed by LOC (1961) 51.440 is  
15 to ensure that only buildable lots are created, and that  
16 petitioners' interpretation would render such requirements  
17 ineffective for that purpose. Respondents argue that it  
18 makes no sense to interpret the lot width requirement of LOC  
19 (1961) 51.440(2) in a way that would allow lots to be  
20 created which are substandard for the major use permitted in  
21 the R-7.5 zone (residential).

22 We see nothing in the LOC (1961) to indicate the lot  
23 width requirement of LOC (1961) 51.440(2) was not applicable  
24 to the creation of an undeveloped lot. We agree with  
25 respondents that the lot size standards of LOC (1961)  
26 51.440, including lot width at the front building line, were

1 applicable to the creation of a new R-7.5 zoned parcel in  
2 1963. Because Tax Lot 10800 did not comply with the R-7.5  
3 lot width requirement of LOC (1961) 51.440(2) when it was  
4 created in 1963, it was not "legally created." Therefore,  
5 the city did not err in concluding Tax Lot 10800 fails to  
6 qualify for a lot size exception pursuant to LOC 48.515(1).

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 "The City failed to follow the procedures  
10 applicable to the matter before it when it based  
11 its \* \* \* decision on [LOC] standards that had not  
12 been identified as applicable during the  
13 proceeding below and had not been addressed by any  
14 party to the proceeding. The City actions denied  
15 the petitioners the opportunity to respond to  
16 these standards and denied them the opportunity to  
17 offer evidence of their compliance with these  
18 standards. In so doing, the City prejudiced the  
19 petitioners' substantial right to a full and fair  
20 hearing."

21 Petitioners argue the challenged decision should be  
22 remanded because the city relied upon LOC (1961) 50.300 and  
23 LOC 49.105 without giving petitioners notice these  
24 provisions are applicable standards or an opportunity to  
25 provide evidence or argument regarding these standards.  
26 Petitioners contend these LOC provisions were not placed  
27 before the city decision maker or mentioned in the  
28 proceedings below prior to the adoption of the city's final  
29 written decision on April 16, 1991.

30 Petitioners contend the city council basing its  
31 decision on these two LOC provisions violates LOC

1 48.810(3)(m) and 48.825.7, which limit the city council's  
2 review to the record of the planning commission proceeding  
3 and require that the city council's decision be based on the  
4 record of the proceeding.<sup>8</sup> Petitioners also contend the  
5 city council's reliance on LOC (1961) 50.300 and LOC 49.105  
6 violates ORS 197.763(3)(b), which requires that a list of  
7 applicable standards be included in the notice of a  
8 quasi-judicial land use hearing.<sup>9</sup> Petitioners argue this

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<sup>8</sup>Petitioners actually cite LOC 49.610(3)(M) and 49.625(7). However, as respondent points out, the appeal procedures of LOC Title 49 apply only to appeals of Development Review Board decisions. We therefore cite the identically worded provisions of LOC Title 48 which are applicable to appeals under that title.

<sup>9</sup>As we understand it, petitioners also argue the city council actually made its final decision in this matter orally at its March 12, 1991 meeting and on April 16, 1991, improperly adopted written findings which have no basis in the March 12 decision, as an "apparent post-hoc justification for the decision." Petition for Review 21. Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 390 (1979); Sokol v. City of Lake Oswego, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 89-050 and 89-051, November 14, 1989), slip op 32-36.

However, we agree with respondents that the procedure followed by the city complies with the requirements of LOC 48.810(3)(l) and (m) requiring the city to make a tentative oral decision at the conclusion of the public hearing and subsequently adopt a written order setting forth the basis for that decision. Such a procedure is common practice and has been upheld by this Board. Sokol v. City of Lake Oswego, supra, slip op at 34. Further, the city decision reviewed on appeal is the final written decision of the city council. Inconsistencies between the final written decision and earlier verbal explanations of a tentative decision are not a basis for reversal or remand. Waker Associates, Inc. v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-016, Order on Motions to Strike and for Evidentiary Hearing, July 26, 1991), slip op 4; Cook v. City of Eugene, 15 Or LUBA 344, 355 (1987); Citadel Corp. v. Tillamook County, 9 Or LUBA 61 (1983), aff'd 66 Or App 965 (1984). Finally, this case is significantly different from Heilman v. City of Roseburg. In Heilman, findings adopted after an earlier decision were not incorporated into an order and did not purport to ratify the earlier decision. Therefore, the earlier decision had to stand on its own, and impermissibly failed to include findings.

1 error prejudices their substantial right to an opportunity  
2 to respond to evidence and address standards prior to the  
3 close of the record in the proceeding below. Angel v. City  
4 of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-108, March 6,  
5 1991), slip op 10-11.

6 **A. LOC 48.810(3)(m) and 48.825(7)**

7 The LOC provisions cited by petitioners limit the  
8 evidentiary record considered by the city council on review,  
9 and require the council to base its decision on the evidence  
10 in the record. They do not limit the city council's ability  
11 to take official notice of applicable law. To the contrary,  
12 LOC 48.840(3)(a) provides that "the hearing body may take  
13 official notice of [the city's] charter, ordinances,  
14 resolutions, rules regulations and official policies  
15 \* \* \*."<sup>10</sup> The city council did not violate LOC 48.810(3)(m)  
16 and 48.825(7) by citing LOC (1961) 50.300 and LOC 49.105 in  
17 its final order.

18 This subassignment of error is denied.

19 **B. ORS 197.763(3)(b)**

20 ORS 197.763(3) provides in relevant part:

21 "The notice [of a quasi-judicial land use hearing]  
22 provided by the jurisdiction shall:

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Here, the findings adopted on April 16, 1991 were incorporated into a written order ratifying the city council's earlier tentative decision.

<sup>10</sup>Respondents point out that at the beginning of the city council's March 12, 1991 hearing, petitioners' attorney stated he "assume[d] the Council will, as the Planning Commission did, take official notice of \* \* \* city codes, both past and present." Respondent's Brief App-4.

1           "\* \* \* \* \*

2           "(b) List the applicable criteria from the  
3           ordinance and the plan that apply to the  
4           application at issue;

5           "\* \* \* \* \*."

6           The first provision petitioners contend should have  
7           been listed in the city's notice of hearing is:

8           "Maintenance of Minimum Ordinance Requirements

9           "No lot area \* \* \* existing on or after the  
10          effective date of this ordinance shall be reduced  
11          in area, dimension, or size below the minimum  
12          required by this ordinance \* \* \*." LOC (1961)  
13          50.300.

14          This provision is cited in a section of the city's  
15          decision responding to petitioners' argument below that Tax  
16          Lot 10800 was legally created because the lot area and  
17          dimension standards of LOC (1961) 51.440 did not apply to  
18          its creation, in that the city's subdivision ordinance did  
19          not regulate partitions creating fewer than four lots. The  
20          decision states:

21          "\* \* \* There is no logical reason for the 1961  
22          City Council to enact lot area and dimension  
23          standards as part of the Zoning [Ordinance] and  
24          apply those standards to property located outside  
25          the jurisdiction of the subdivision ordinance,  
26          unless the Council intended such standards to have  
27          independent effect. It is equally unlikely the  
28          Council intended to allow property owners to  
29          create parcels in violation of the Zoning  
30          Ordinance simply by dividing less than four lots  
31          and thus avoiding application of the Subdivision  
32          Ordinance." Record 12-13.

33          The decision then quotes LOC (1961) 50.300 and states that

1 relief from this provision could only be obtained through a  
2 variance. Finally, the decision concludes the 1961 Zoning  
3 Ordinance was clearly applicable to the creation of Tax Lot  
4 10800 in 1963, and the R-7.5 zone lot width standard was  
5 violated in the creation of Tax Lot 10800. Record 13.

6 The second provision at issue is:

7 "Development Restricted on Improperly Created Lot.

8 "No development permit shall be issued for the  
9 development or use of a lot that was created in  
10 violation of legal requirements in effect and  
11 applicable at the time the lot was created unless  
12 the lot complies with all legal requirements in  
13 effect at the time of approval of the requested  
14 permit. \* \* \*"<sup>11</sup> LOC 49.105.

15 This provision is cited in a section of the city's  
16 decision responding to petitioners' argument below that the  
17 "grandfather clause" of LOC 48.515(1) does not require that  
18 a preexisting substandard "lot" have been legally created in  
19 order to qualify for an exception. The decision points out  
20 that the Zoning Code (LOC Title 48) contains no definition  
21 of "lot," and quotes LOC 49.105 from the Development Code  
22 (LOC Title 49). The decision then concludes:

23 "LOC 49.105 clearly and unequivocally prohibits  
24 development of illegally created lots. \* \* \* The  
25 appellants' interpretation that LOC 48.515(1)  
26 grandfathers both legally and illegally created  
27 lots would thus place the Zoning Code in  
28 irreconcilable conflict with the Development Code.

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<sup>11</sup>This provision was adopted in 1981 as part of the city's Development Ordinance. The 1981 Development Ordinance is codified as Title 49 of the current LOC.

1 LOC 49.105 was adopted September 15, 1981, a year  
2 before the 'grandfathering' provision in LOC  
3 48.515(1) was most recently updated. When the  
4 Council adopted LOC 49.105 and amended LOC  
5 48.515(1), it presumably did not intend to create  
6 conflicting provisions. The Council therefore  
7 concludes that the term 'lot' as it is used in LOC  
8 48.515(1) was intended to grandfather only those  
9 lots which were legally created but which became  
10 nonconforming as a result of subsequent amendments  
11 to the Code. This interpretation is also  
12 supported by the legislative history which  
13 indicates the 'grandfather' date in LOC 48.515(1)  
14 has been updated when significant amendments to  
15 the Zoning Code have been made." Record 15-16.

16 The above quoted portions of the city's decision do not  
17 rely on LOC (1961) 50.300 or LOC 49.105 as independent bases  
18 for determining that Tax Lot 10800 is not a buildable lot,  
19 but rather cite these provisions in support of the city's  
20 interpretation regarding the applicability of LOC (1961)  
21 51.440(2) to the 1963 creation of Tax Lot 10800 and the  
22 applicability of LOC 48.515(1) to illegally created lots.  
23 There is no dispute that the interpretation of LOC  
24 (1961) 51.440(2) and LOC 48.515(1) were the central issues  
25 in the proceeding below. Fairly read, petitioners' request  
26 for a code interpretation asks the city to clarify whether  
27 Tax Lot 10800 is entitled to an exception from R-10 lot size  
28 requirements under LOC 48.515(1). We do not think ORS  
29 197.763(3)(b) requires the city to list LOC (1961) 50.300  
30 and LOC 49.105 as "applicable criteria" in order to be able  
31 to consider them in interpreting LOC (1961) 51.440(2) and  
32 LOC 48.515(1) consistently with related LOC provisions.

1 This subassignment of error is denied.

2 The second assignment of error is denied.

3 **RELATED ISSUES**

4 At the oral argument in this appeal, petitioners  
5 presented argument that the city erred in interpreting LOC  
6 48.515(1) to require that a preexisting substandard lot be  
7 legally created in order to qualify for an exception.  
8 Petitioners contended that LOC 48.515(1) should be  
9 interpreted to grant Tax Lot 10800 an exception to R-10 lot  
10 area standards, regardless of whether Tax Lot 10800 was  
11 "legally created."

12 Respondents object to the Board's consideration of the  
13 above described argument. Respondents contend the issue of  
14 whether LOC 48.515(1) requires that Tax Lot 10800 was  
15 legally created was not raised in the petition for review  
16 and cannot be raised for the first time at oral argument.  
17 Respondents argue that for the Board to consider such  
18 argument would be akin to allowing the petition for review  
19 to be amended to include a new assignment of error.  
20 Respondents point out that in Hale v. City of Beaverton, \_\_\_  
21 Or LUBA \_\_\_ (LUBA No. 90-159, June 4, 1991), slip op 2-5,  
22 the Board denied a motion to amend the petition for review,  
23 where the motion was filed one day before oral argument.

24 Portions of the petition for review quoted under the  
25 first assignment of error, supra, clearly indicate that the  
26 issue raised under that assignment was whether Tax Lot 10800

1 had been legally created. That assignment of error accepts  
2 the premise that if Tax Lot 10800 were legally created, it  
3 would be entitled to an exception from R-10 lot size  
4 standards under LOC 48.515(1). The second assignment of  
5 error does not challenge the city's interpretation of LOC  
6 48.515(1) at all. Rather, that assignment of error asserts  
7 a procedural error, based on petitioners' erroneous  
8 assumption that the city based its decision on LOC (1961)  
9 50.300 and LOC 49.105. We, therefore, agree with  
10 respondents that the issue of whether the city incorrectly  
11 interpreted LOC 48.515(1) to require that an existing  
12 substandard lot be legally created was not raised in the  
13 petition for review.

14 Our rules require that petitioners' assignments of  
15 error and legal argument be set out in the petition for  
16 review. OAR 661-10-030(3). Respondents then have an  
17 opportunity to reply to petitioners' arguments in their  
18 response briefs. For us to consider an issue raised for the  
19 first time at oral argument would prejudice respondents'  
20 rights to reasonable time to prepare and submit their cases  
21 and a full and fair hearing. OAR 661-10-005.

22 We, therefore, decline to consider whether the city  
23 correctly interpreted LOC 48.515(1) to require that Tax Lot  
24 10800 was legally created.

25 The city's decision is affirmed.